No. 93-1014

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In The

Supreme Court of the United States

October Term, 1993

DONNA F. CARDWELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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52 pp

QUESTIONS PRESENTED

1. Whether under the separation of powers principle it is the function of the executive branch to determine the applicability of the Federal Employees Compensation Act (FECA) to a tortious cause of action or whether the substitution of FECA for the Federal Torts Claims Act (FTCA) should properly be determined by the judicial branch.

2. Whether the district court properly substituted the United States for the individual co-defendants, thus precluding a claim under FTCA for intentional infliction of emotional distress.

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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania, dismissing Petitioner's complaint for lack of subject metter jurisdiction under 28 U.S.C. § 1346(b) was handed down on December 3, 1992

The decision of the United States Court of Appeals for the Third Circuit, affirming the orders of the District Court dated June 10, 1992, and December 3, 1992, was adjudged and ordered on September 24, 1993.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on September 24, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Title 5 U.S.C. § 8145(a) provides the following: "the Secretary of Labor shall administrate and decide all questions arising under this subchapter."

Title 5 U.S.C. § 8101(5) provides the following: "injury includes, in addition to injury by accident, a disease proximately caused by the employment, . . ."

According to *Marbury v. Madison*, 1 Cranch 137, 165, 2 L. Ed. 60 (1803), the power of administrative bodies to engage in governmental activities is circumscribed by the authority granted.

STATEMENT OF THE CASE

Claiming that the Respondent inflicted emotional distress

upon her through a series of work-related incidents during her employment, the Petitioner has sued under the Federal Torts Claims Act (FTCA). The Petitioner contends that these incidents created a hostile work environment which rose to the level of an intentional infliction of emotional distress.

On December 4, 1992, the United States District Court for the Eastern District of Pennsylvania dismissed Petitioner's cause of action on grounds that FECA was the sole remedy for an employee challenging actions taken against her by employees of the Veterans Administration acting within their scope of employment.

Judge O'Neill's Order of Dismissal dismissed the Petitioner's cause of action against the United States *et al.*, and Judge O'Neill's previous order substitutedd the United States of America for the following individuals: Thomas Lastowka, Joseph Thompson, Gerald Schweiger, W.F. Adams, William Staarman, and John McKenna. The Order of Substitution was entered June 10, 1992, by the Honorable Thomas N. O'Neill, Jr., Judge of the United States District Court for the Eastern District of Pennsylvania.

Finally, the Honorable Court determined that the dismissal of the instant case should be affirmed because under Pennsylvania law the Petitioner failed to stat a claim for intentional infliction of emotional distress.

This is an appeal from an Order of Dismissal entered on the 4th day of December, 1992, and an Order of Substitution entered June 10, 1992, by the Honorable Thomas N. O'Neill, Jr., Judge of the United States District Court for the Eastern District of Pennsylvania.

Judge O'Neill's Order of Dismissal dismissed the Petitioner's cause of action against the United States *et al.*, and Judge O'Neill's previous order substituted the United States of America for the following individuals: Thomas Lastowka, Joseph Thompson,

Gerald Schweiger, W. F. Adams, William R. Staarman, and John McKenna.

A. Statement of Facts

During the period from May 1982, through November 1988, the Petitioner was employed by the Veterans Administration of Philadelphia as a psychologist for their regional office and Insurance Center. The Petitioner contends that during this time she was subjected to actions which constituted intentional infliction of emotional distress. Specifically, these actions included th e following: a restriction of sick leave; a reduction of her performance rating; charges of insubordination; unjustified error calls; threats of dismissal; refusal to grant training and administrative relief from harassment; and admonishment letter; coercion of the Petitioner to withdraw an appeal of her suspension; and a refusal to acknowledge the legitimacy of her claim.

On or about January 4, 1989, Petitioner filed an administrative claim with the Office of District Counsel for the Veterans Administration, and a final denial of reconsideration was dated September 27, 1991. The Petitioner then sued under the Federal Torts Claim Act (FTCA), 28 U.S.C. §§ 1346 *et seq*. claiming that she was subjected to intentional infliction of emotional distress by the Respondent. The Petitioner also filed under the Federal Employees Compensation Act (FECA), with the same cause of action to which there was never a determination of whether FECA covered the Petitioner's injuries. Intentional infliction of emotional distress, which was alleged in her complaint, is an action beyond the scope of federal employment. Absolute immunity is inapplicable to federal employees who act beyond the scope of their federal employment.

The Petitioner is appealing the order which substituted the United States for the individual defendants and the order dismissing her cause of action.

B. Prior Proceedings

1. Administrative Litigation

Petitioner has sought administrative relief under FECA and CSRA. Seeking compensation under FECA for emotional injuries allegedly related to factors of her federal employment, the Petitioner filed an administrative claim with the Department of Labor on January 21, 1988. *In Re Donna F. Cardwell and the Veterans' Administration,* Admin. Docket No. 90-325 (May 11, 1990), p. 1 (Supp. App., pp. 19-27). On August 4, 1989, Office of Workers' Compensation Programs (OWCP) denied the Petitioner's claims. The Petitioner then appealed this decision to the Employees Compensation Appeals Board (ECAB). This claim was denied on May 11, 1990, because of an alleged failure to establish a nexus between Petitioner's emotional disability and the factors of her work-related environment.

She appealed her April 8, 1988 removal from her employment at the Veterans Administration for insubordination to the Merit Systems Protection Board (MSPB) Docket No. PH 07528810311, on August 24, 1988. On August 24, 1988, the MSPB affirmed the agency's removal action finding no grounds for the Petitioner's claim of harassment. Although the Petitioner sought a second review of her case, on January 6, 1989, the MSPB again affirmed the agency's action in dismissing the Petitioner's case.

2. Federal District Court Litigation

In April of 1986, the Petitioner sued various officials of the Veterans Administration and the Department of Labor. *Donna F. Cardwell v. General Thomas K. Turnage, et al.,* Civil Action No. 86-2226 (E.D. Pa., filed April 18, 1986). Claimijng jurisdiction under the Federal Torts Claims Act and Title VII, the Petitioner alleged that a sick leave restriction in 1982, a letter of admonishment, and a work suspension were atributable to gender discrimination.

Another complaint was filed by the Petitioner with the district court on August 15, 1988. *Donna F. Cardwell v. United States, et al.*, Civil Action No. 87-0962 (E.D. Pa.). Claiming jurisdiction under the Federal Torts Claims Act and Title VII, against sought relief from unlawful employment practices t the Veterans Administration, namely, restricted sick leave, an undeserved error call, unjstifiable suspension, and subjection to an atmosphere of harassment. By order of District Judge Thomas O'Neill, Jr., entered November 9, 1988, in Civil Action No. 87-0962 (E.D. Pa.) this action was suspended conditioned upon the Petitioner's exhaustion of her administrative claims.

In conclusion, on August 12, 1992, the Petitioner filed an interlocutory appeal to rescind the order of June 10, 1992, which substituted the United States for the individual co-defendants. The Court of Appeals for the Third Circuit dismissed Petitioner's appeal for lack of jurisdiction on September 22, 1992) (Doc. Entry 55, App., p. 9(a)).

On or about January 4, 1989, Petitioner filed an administrative claim with the Office of District Counsel for the Veterans Administration, and a final denial of reconsideration was dated September 27, 1991.

The aforementioned FECA case is *In Re Donna F. Cardwell and the Veterans' Administration*, Admin. Docket No. 90-325 (May 11, 1990).

In the United States District Court for the Eastern District of Pennsylvania, the Petitioner filed her original complaint on January 7, 1992, amended it on February 14, 1992, and amended it again on November 16, 1992.

The United States filed a motion to substitute on April 13, 1992, which was granted on June 10, 1992, by Judge O'Neill.

The United States filed a renewed motion to dismiss on August 18, 1992, which was granted on December 4, 1992, by Judge O'Neill.

REASONS FOR GRANTING THE WRIT

I.

FECA DOES NOT APPLY TO THE PRESENT ACTION; THEREFORE, FECA'S EXCLUSIVITY PROVISION IS IRRELEVANT TO THE PRESENT ACTION BECAUSE OF THE SEPARATION OF POWERS.

The present action is beyond the statutory limits of the Federal Employees' Compensation Act (FECA). FECA's definition of injury "includes, in addition to injury by accident, a disease proximately caused by employment, . . ." 5 U.S.C. § 8101 (5). Neither intentional infliction of emotional distress nor emotional distress falls within the statutory limits of FECA. The present action clearly does not fall under injury by accident, nor a disease proximately caused by employment. Because the applicability of legislative enactments such as FECA, CSRA, and FTCA is determinable by the court and not the Secretary of Labor, FECA's exclusivity provision does not bar the Petitioner's action.

While the Secretary of Labor administers FECA, promulgates rules and regulations thereunder, and decides all questions arising under the statute, the Congress has not conferred upon him the authority to decide issues relative to the applicability of statutes. As a matter of constitutional law, Congress may bar any judicial review of the Secretary's determination of FECA coverage, but may not subvert the court's right to make the ultimate decision as to whether an employee is entitled to pursue his civil action by an administrative or judicial proceeding under a workmen's compensation statute or under a federal tort liability statute. Consequently, when FTCA applies, the federal courts have subject

matter jurisdiction over a suit brought by a federal employee for intentional infliction of emotional distress.

The District Court's decision is contrary to the decision of the Supreme Court in *Marbury v. Madison*, 1 Cranch 137, 165 2 L. Ed. 60 (1803); *Stark v. Wickard*, 321 U.S. 288, 309-310 (1944); *Social Security Board v. Nierotko*, 327 U.S. 358 (1946).

The Respondent would have this Court believe that the Secretary of Labor has the power to finally decide the limits of his statutory power. To the contrary, it is for the courts to decide the limitations of acts and not the Secretary of Labor. "Administrative determinations must have a basis in law and must be within the granted authority . . . . An agency may not finally decide the limits of its statutory power. That is a judicial function." *Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946). The inapplicability of FECA to the case at bar is for the judiciary to decide and not the Secretary of Labor. The Secretary of Labor may not usurp the power delegated to the judicial branch of government by expanding the limitations of his powers granted under FECA to include causes of actions clearly under FTCA. It is the duty of the courts to check the powers of the Executive Branch, especially when the Legislative Branch delegates limited judicial power. The Judicial Branch of government is best suited to interpreting the laws and statutes of the United States government, and not an Executive Branch appointee whose experience in the interpretation of the law is not only questionable but also subject to political sway.

> When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect

> justiciable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of the statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction.

Stark v. Wickard, 321 U.S. 288, 309-310 (1944).

The gravamen of the Petitioner's case rests on the following quotation of 5 U.S.C. § 8145(a): "the Secretary of Labor shall administrate and decide all questions arising under this subchapter." The Petitioner cannot dispute that the Secretary of Labor has the undisputed authority to decide all questions arising under FECA.

The question before this Honorable Court is whether the Complaint of the Petitioner is under FTCA coverage. The qestion in the case at bar is not a question arising under FECA by virtue of the statutory limitations placed on FECA. More importantly, the question of the limitations of FECA is not the szame as a question arising under FECA.

The case at bar is not designed to have the courts review the agency's decision but rather to decide whether FTCA covers the matters complained of by the Petitioner.

A tort is alleged by the Petitioner. The tort does not involve negligence. The tort is intentional infliction of emotional distress. FECA compensates the federal employee "regardless of the negligence of the employee of his fellow servants, or the lack of fault on the part of the United States." *Weyerhaenser S.S. Co. v. United States*, 372 U.S. 597, 601 (1963). The case at bar does not allege negligence.

By a careful reading of the statutes, on can discern the difference between deciding whether FECA applies to a claim or to a question arising under FECA.

The Legislative Branch did not give the Secretary of Labor or his surrogate the power of the Judicial Branch of government. The Legislative Branch gave the Secretary of Labor the power to decide all questions arising under FECA not the power to decide the limitations of FECA.

II.

THE LEGISLATIVE BRANCH GAVE THE SECRETARY OF LABOR THE POWER TO MAKE DECISIONS UNDER FECA NOT THE POWER TO DECIDE THE APPLICABILITY OF FECA.

The crucial issue is not whether a substantial question of coverage exists under FECA, but who should make the determination of FECA's applicability. The party-opponents opt for a determination by the administrative agency, whereas the Petitioner, on the other hand, would defer the determination to the courts. Congress has mandated that FECA coverage and tort claims liability be mutually exclusive.

The Petitioner concedes that the Secretary's ultimate decision regarding the coverage of FECA is not debatable. The coverage of FECA does indeed require the following analysis:

> If the Secretary determines that the injury did not occur in the performance of duty, FECA does not cover the injury, and the employee may proceed in court. On the other hand, if the employee was injured in the performance of duty, the Secretary's decision regarding coverage will be binding on the court,

> regardless of whether compensation is actually awarded.

McDaniel v. United States, 970 F.2d 194, 198 (6th Cir. 1992).

The cases cited by the Respondent were concerned with whether there was a substantial question of coverage, whereas, in the instant case, the issue focuses on whether the employee's cause of action actually comes within the provisions of workmen's compensation statutes. The Respondent's case must rise or fall on whether the Petitioner's injuries were incident to her employment. Under the general principles of workmen's compensation law, the administrative agency here could not reasonably decide that as a matter of law a substantial question of FECA coverage is presented.

It is the Petitioner's contention that FECA does not encompass causes of action based on emotional injuries arising from discriminatory activities. A common law tort claim sounding in emotional distress falls outside the scope of FECA. Further, the Petitioner submits that the issue does not raise a substantial question as to whether the type of alleged personal injuries are compensable under FECA. Persuasive authority exists to support the conclusion that worker's compensation statutes are not the proper remedial vehicles for the intentional infliction of emotional distress. "Claims for discrimination, harassment, and wrongful discharge are not of the type covered by typical workers' compensation acts of by FECA." *Metz v. United States*, 723 F. Supp. 1133, 1136 (D. Md. 1989). Since no substantial question as to FECA coverage can be advanced, the Petitioner is under no legal compulsion to obtain a ruling from the Secretary of Labor regarding FECA's applicability for emotional distress. Most importantly, a distinction has to be drawn between the application has to be drawn between the application of FECA on the one hand and a substantial question arising under FECA concerning job-related injuries occurring during the course of an employee's employment on the other hand. In the instant case, no substantial

question of FECA coverage was present; therefore, the Petitioner may maintain a separate action under FTCA without first applying to the Secretary of Labor for his administrative interpretation of her claim.

III.

PETITIONER HAS A RIGHT TO THE JUDICIAL EXAMINATION OF HER COMPLAINT SINCE NO MATTER OF ADMINISTRATIVE DISCRETION IS INVOLVED.

The Respondent argues that FECA includes an "unambiguous and comprehensive provision barring any judicial review of the Secretary's determination of FECA coverage." The Respondent relies on *McDaniel v. United States*, 970 F.2d 194 (6th Cir. 1992), in which the Supreme Court has stated that "the courts have no jurisdiction over FTCA claims where the Secretary of Labor determines that FECA applies." Admittedly, the Secretary's ultimate decision regarding the coverage of FECA is not subject to judicial review; however, the applicability of FECA to a given situation mandates a different analysis.

As a result of *Marbury v. Madison*, 1 Cranch 137, 165, 2 L. Ed. 60 (1803), the power of administrative bodies to engage in governmental activities is circumscribed by the authority granted. The determination of the boundaries and limits of statutory grants of authority is a judicial function not subject to administrative interpretation. As a result, the trial court is free to consider whether the statutory authority given the Secretary is a valid answer to the Petitioner's contention. An agency may not finally decide the limits of its statutory power. Such decisions are reserved for judicial determination and are conclusive as to reserved for judicial determination and are conclusive as to properly supported findings of fact. The Petitioner contends that the applicability of FECA to the instant case is beyond the permissible limits of

administrative interpretation. Since no matter of administrative discretion is involved, the Petitioner has a justiciable right to maintain a separate action under FTCA.

The case at bar is not grounded in judicial review of an administrative decision. It is grounded in whether administrative power can be exerted under FECA to determine the matters complained of by the Petitioner. The Petitioner contends that the determination of the applicability FECA by the Secretary of Labor would be tantamount to the exertion of unauthorized administrative power. Only when the Secretary of Labor confines his function to administrating and deciding all question arising under FECA is he well within the statutory power granted to him. When he is permitted to decide questions of applicability of FECA, he not only exceeds his statutory power, but by so doing he denies aggrieved persons the authority to seek appropriate relief in the federal courts in the exercise of their appropriate jurisdiction.

> This court is swayed by the more persuasive authority found in the Sixth and Ninth Circuits that FECA does not encompass claims based on emotional injury. Courts particularly emphasize that emotional injuries arising from discriminatory activities, as alleged here, are outside the scope of FECA.
>
> If there is no substantial question as to FECA coverage, the injured employee may commence an action under FTCA. In the instant case, I have concluded that mental distress is not an injury which is cognizable under FECA. Accordingly, "there is no substantial question to be resolved on the coverage of FECA [because] FECA is plainly inapplicable here." (questions of coverage relating to the merits of the underlying

> compensation claim [such as whether the employee was injured on the job] must be deferred to the Secretary of Labor but not questions regarding FECA's scope).

Gergick v. Austin, 764 F. Supp. 580, 581 (W.D. Mo. 1991).

A substantial question exists unless it is certain that the Secretary would not find coverage. In the instant case, the Secretary of Labor could not find coverage because intentional infliction of emotional distress is beyond the limitations of the Federal Employees' Compensation Act.

> . . . (if a claim is covered under FECA, then the federal courts have no subject matter jurisdiction to entertain the action); Resolution of the coverage qestion has been entrusted to the Secretary of Labor. 5 U.S.C. § 8128(b). Thus, the employee must first seek and be denied relief under the FECA *unless his/her injuries do not present a substantial question of compensability under that act.*

Bruni v. United States, 964 F.2d 76, 79 (1st Cir. 1992), emphasis added).

IV.

THE PETITIONER'S SOLE RECOURSE FOR WORK-RELATED INJURIES IS FECA; HOWEVER, THE PRESENT SUIT MAY BE MAINTAINED SINCE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AND EMOTIONAL DISTRESS ARE NOT WORK-RELATED IN THE INSTANT CASE.

This style of complaint is outside the scope of Federal Employees Compensation Act (FECA); thus, the exclusivity provisions of the Act are inapplicable. The Petitioner is seeking

relief from the individual defendants and the United States, and the gravamen of the Petitioner's case is based upon the lack of subject matter jurisdiction of the Federal Employees Compensation Act (FECA) since FECA is only applicable when there has been a work-related physical injury or death. The Petitioner asserts that the Federal Torts Claim Act (FTCA) is the proper method of recovery from the individual defendants and the United States for intentional infliction of emotional distress. The remedy sought is reinstatement, compensatory and punitive damages. The Federal Employees Compensation Act only provides for compensatory damages.

In the case of *Sullivan v. United States*, 428 F. Supp. 79 (E.D. Wis. 1977), the United States attempted to dismiss the Plaintiff's case by making the argument that FECA coverage was the exclusive method of recovery. The learned judge denied the motion of the United States by correctly pointing out that FECA applied in cases only where there was an injury by accident and disease. The harm that FECA was designed to cure was not the type of harm that occurred in the instant case. FECA does not grant compensation when claims are made for discrimination, mental distress and loss of employment. Although the statute of limitations for a discrimination action is past in the instant case, the Petitioner is requesting relief for intentional infliction of emotional distress and loss of employment. The theories advanced by the Petitioner are the same as in the case of *Sullivan v. United States*, 428 F. Supp. 79 (E.D. Wis. 1977), which stated:

> The motion of the defendant United States is bottomed on its contention that Mr. Sullivan's "exclusive remedy in this matter is with the Office of Workers' Compensation Programs." Section 1005(c) of 39 U.S.C. provides that remedies for certain injuries are available exclusively under 5 U.S.C. § 8101, which relates to compensation for federal

> employees for work-connected injuries. I believe the position of the United States is incorrect. The type of injuries covered in 5 U.S.C. § 8101(5) includes injury by accident and disease; it does not appear to include such claims as are presented here for discrimination, mental distress, or loss of employment. The argument advanced by the defendant United States therefore does not entitle it to dismissal of this action.

Sullivan v. United States, 428 F. Supp. 79, 81 (E.D. Wis. 1977).

Since FECA is the workers' compensation act for the federally employed, it gives similar coverage to federal employees for death, personal injury disability or disease that the state workers' compensation acts provide. The claims of the Petitioner in the instant case are not covered by FECA and would not be covered by any workers' compensation act of any of the several states; therefore, the Petitioner must seek remedies under the Federal Tort Claim Act (FTCA). The case of *Metz v. United States*, 723 F. Supp. 1133 (D. Md. 1989), clearly points out this distinction when the court stated:

> Claims for discrimination, harassment, and wrongful discharge are not of the type covered by typical workers' compensation acts or by FECA. FECA applies to disability or death arising from a work-related injury which is defined to be personal injury caused by accident or by disease that is proximately caused by the employment. See 5 U.S.C. §§ 8101, 8102.

Metz v. United States, 723 F. Supp. 1133, 1136 (D. Md. 1989).

The District Court for the District of Columbia also concluded that the FECA is not applicable when the cause of action states a claim for intentional infliction of emotional distress. The court in *Newman v. Legal Services Corp.*, 628 F. Supp. 535 (D.D.C. 1986), stated that: "A claim for emotional distress clearly appears not to be an injury covered under FECA and therefore, FECA does not provide the exclusive remedy for emotional distress." (citations omitted); *Newman v. Legal Services Corp.*, 628 F. Supp. 535, 543 (D.D.C. 1986). In point of fact FECA provides no recovery for emotional distress since it is beyond the scope of the Act.

Emotional distress is not physical harm. Since FECA provides an exclusive remedy for physical harm and the appellant's claim is not for physical harm, the case at bar falls outside the perimeter of FECA. The FTCA is the only avenue for the Petitioner to seek redress for her mental distress and loss of employment.

> Similarly, while the FECA was and is intended to provide an exclusive remedy for all employees of the United States suffering from job-related injuries, *see Johansen v. United States*, 343 U.S. 427, 440-41, 72 S.Ct. 849, 857-58, 96 L.Ed. 1051 (1952) (civilian crewmen of public vessel), the very nature of the FECA as a workers' compensation statute bars recovery for anything other than injuries (resulting in some form of physical disability) or death. *See, e.g.*, 5 U.S.C. §§ 8101(5) (defining "injury" as physical harm) . . .

Guidry v. Durkin, 834 F.2d 1465, 1471-72 (9th Cir. 1987).

The district court will not read into FECA remedies that are not provided by Congress. Nor will the courts expand the scope of the Act beyond the exact words of the statute. Neither the language nor the history of the Act suggest that claims for severe emotional disturbance are actionable under FECA. Conversely, the courts

have recognized that conduct relied upon as constituting the intentional infliction of emotional distress is covered by FTCA. In the case of *Sheehan v. United States*, 896 F.2d 1168 (9th Cir. 1990), the court stated the following:

> In sum, the district court lacked jurisdiction to hear Sheehan's claim only is that claim was cognizable under FECA. We hold it was not.
>
> FECA compensates government employees only for physical harm. *Guidry v. Durkin*, 834 F.2d 1465, 1471-72 (9th Cir. 1987). Sheehan's alleged injury-emotional distress-is divorced from any claim of physical harm.

Sheehan v. United States, 896 F.2d 1168, 1174 (9th Cir. 1990). Since emotional distress is divorced from any physical harm, the claim for intention infliction of emotional distress does not fall under the coverage of the FECA.

The District Court for the Eastern District of Pennsylvania found that claims for mental suffering, humiliation, embarrassment or loss of employment are not barred by FECA's exclusivity provision. The gravamen of the district court's finding was mental suffering. Moreover, loss of employment is not a traditional claim for workers' compensation. FECA is workers' compensation for the federal employee, and its scope of coverage is limited to physical injury, disease and death. The Petitioner has not alleged in her complaint that there was any physical injury, disease or death; therefore, it is improper to apply FECA to the case at bar. The court in *Lawrence v. United States*, 631 F. Supp. 631 (E.D. Pa. 1982), stated:

> Notwithstanding the "exclusive" nature of the FECA remedies for federal employees, as

> noted above, the Court finds that dismissal of plaintiff's claims on this basis is not warranted. First, the exclusivity of FECA remedies only applies to the redress of injuries within the coverage of the Act, that is, job-related physical injury. *See* 5 U.S.C. 8101(5). The courts, in this regard, have held that FECA does not provide coverage for mental suffering, humiliation, embarrassment or loss of employment such as have been alleged by the plaintiff. *Sullivan v. U.S.*, 428 F.Supp. 79 (E.D.Wis. 1977); *Mason v. District of Columbia*, 395 A.2d 399 (D.C.App. 1978). Since such injuries are not within FECA coverage, the "exclusivity" of FECA remedies will not bar the present action. *Lawrence v. U.S.*, 631 F.Supp. 631, 636-37 (E.D.Pa. 1982).

The Third Circuit Court of Appeals for the Federal Circuit agreed with this opinion in *Heilman v. United States*, 731 F.2d 1104 (3rd Cir. 1984), (civilian employee suffered injury in the course of radiation testing) that FECA is the exclusive remedy *for injuries falling within the scope of FECA coverage*; however, since the claim made by the appellant is for intentional infliction of emotional distress and loss of employment, and FECA's scope is limited to physical injury, disease or death, the exclusivity provision of FECA does not apply.

The definiation of "injury" to which FECA's coverage is applicable is injury by accident and disease which does not include intentional infliction of emotional distresss nor the loss of employment. FECA states:

> § 8101. Definitions
>
> For the purpose of this subchapter [5 U.S.C.S. §§ 8101 *et seq.*]

> (5) "injury" includes, in addition to injury by accident, a disease proximately caused by the employment, . . .

The rationale set forth in *DeFord v. Secretary of Labor*, 700 F.2d 281 (6th Cir. 1983), provides the appropriate rationale for the case at bar. FECA has limited scope. FECA is workers' compensation for the federal employee. Workers' compensation acts do provide coverage for claims arising from physical injury. The Petitioner in the case at bar has made no claim for physical injury. Based on the scope of FECA and public policy grounds, the Respondent should not be allowed to subvert the intent of FECA by utilizing it as a shield against a claim for intentional infliction of emotional distress and loss of employment.

> The FECA provides generally for compensation upon disability or death of employees due to "personal injury." 5 U.S.C. § 8102. To the extent that the term is potentially relevant here, the definition of an "injury" is more specifically limited to "injury by accident" or by "a disease proximately caused by the employment." 5 U.S.C. § 8101(5). It has been held that "[t]he type of injuries covered in 5 U.S.C. § 8101(5) . . . does not appear to include such claims as . . . for discrimination, mental distress, or loss of employment." *Sullivan v. United States*, 428 F.Supp. 79, 81 (E.D.Wis. 1977). We are inclined to agree. . . . True compensation acts are habitually given a liberal construction in order to effectuate their intended purpose, *e.g.*, *United States v. Udy*, 381 F.2d 455, 456 (10th Cir. 1967), but it should also be recognized that "[s]uch a rule of construction is for the benefit

> of the employee so that liberal coverage under the Act may be provided," *DeSousa v. Panama Canal Co.*, 202 F.Supp. 22, 25 (S.D.N.Y. 1962), and is not a device to be used for applying FECA where it has no application or where stretching its application would be unjust, *id.* at 25; accord, 20 C.F.R. § 10.1(c).

DeFord v. Secretary of Labor, 700 F.2d 281, 290 (6th Cir. 1983). The application of FECA in the instant case would be unjust since FECA is a workers' compensation act. The act is to provide relief for personal injury and/or disease proximately caused by employment. As a workers' compensation act, it must be construed in favor of the employee liberally. The act is not to be stretched to provide a defense. The application of the act to the case at bar is inapposite and unjust based on the traditional notions of fair play and substantial justice. The act is for federal employees to seek compensation for physical injuries, disease proximately caused by employment or death and not as a shield to immunize the individual defendants or the United States of America from tort liability.

Similarly, in the instant case, counsel for the Petitioner contends that on its face the complaint is tantamount to an indictment of outrageous conduct towards the Petitioner by the Respondent both jointly and severally. Implicitly, the complaint contains a set of facts in support of her claim which would entitle her to relief. The surrounding circumstances of the Petitioner's discharge rise to the level of intentional infliction of emotional distress. In the case at bar intentional infliction of emotional distriess was not only unjusitifiable as action beyond the scope of Respondents' employment, but also detrimental to any semblance of professional ethics.

V.

BECAUSE THE INDIVIDUAL DEFENDANTS WERE NOT ACTING WITHIN THE SCOPE OF THEIR EMPLOYMENT, THEY WERE IMPROPERLY SUBSTITUTED AS PARTIES TO THIS CASE.

It is the primary contention of the Petitioner that the actions complained of were not actuated, even to the least degree, by a valid purpose to serve the master. Moreover, it is the Petitioner's contention that the sole actuating purpose of the Respondent was to malevolently cause the Petitioner emotional distress. Section (c) of the Respondent's analysis is entirely inappropriate to the case at bar; consequently, under the Respondent's own analysis the Respondent was not within their scope of employment. According to the analysis of the Respondent, the individual defendants were improperly substituted in the present action.

The Petitioner's position is that intentional torts, such as intentional infliction of emotional distress, are not in the legitimate interest of an agency. Furthermore, it is the Petitioner's view that the commision of the tort of intentional infliction of emotional distress per se places an individual defendant outside the scope of his employment, thereby extinguishing his immunity.

Thus, qualified immunity is inapplicable under circumstances where federal employees act within the course of their employment, but go beyond the scope of their employment in order to follow their own desires which are in no way beneficial to the agency which they serve.

The public policy behind qualified immunity is to allow public employees to discharge their duties without the threat of civil liability when their actions are in good faith. When public employees discharge their duties with objective reasonableness, their conduct needs to be insulated from civil liability so that their

governmental functions are not impeded. However, there are times when public employees through the course of their employment attempt to further their own collateral goals such as the removal of an employee pursuant to their own negative attitudes towards and/or prejudiced evaluation of that employee. In these rare cases, the application of qualified immunity is improper.

> Qualified immunity serves to insulate governmental officials from liability for civil damages when the discretionary conduct of that official "does not violate clearly established statutory or consitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 523 (1982). The standard for applying qualified immunity is an objective one. The Supreme Court has instructed that the inquiry must focus on "the objective reasonableness of an official's conduct, as measured by reference to clearly established law." 457 U.S. at 818, 102 S.Ct. at 2738. . . .
>
> The defendants bear the burden of establishing the defense of qualified immunity, and a plaintiff may overcome the official's defense by demonstrating that his or her clearly established rights were knowingly and recklessly violated.

Brown v. Smythe, 780 F. Supp. 274, 280 (E.D.Pa. 1991). It is alleged by the Petitioner that through the course of their employment the above named individual defendants were acting beyond the scope of their employment and were in no way furthering any of the goals of the agency in which they served. The actions of the above named defendants were designed to force the

Petitioner from her position in the Veterans Administration, and were in no way reasonable. The Petitioner alleges that the above named officials were acting in the course of their employment and to further their own ends used means under the color of their scope of employment.

The balancing of interests is necessary for the government to function properly. There are circumstances in which the government grants qualified immunity when the actions of public officials are consistent with the goals of an agency. However, some public officials use their discretionary powers as a foil to fulfill their own designs. The case at bar is such a situation.

> Our cases have accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.

Anderson v. Creighton, 483 U.S. 635, 638, 107 S.Ct. 3034, 3038 (1987). The totality of the circumstances, which are alleged in the complaint, show an apparent bias against the Petitioner. The actions of the above named defendants are neither consistent with the goals of the Veterans Administration nor with the common law of Pennsylvania which proscribes the intentional infliction of emotional distress.

The issue of whether a certification by the Attorney General is appealable has been answered by case of *Melo v. Hafer*, 912 F.2d 628, 641-42 (3rd Cir. 1990).

> While this case was on appeal, the United States changed its position on this issue. The

> government now states that although the government's determination is entitled to deference, "the district court may review the Attorney General's certification that challenged acts occurred within the scope of employement of a federal official." In light of the division among the courts on this issue, we will analyze the issue de novo before establishing this court's position.
>
> Based on the language, structure and legislative history of FELRTCA, we thus independently conclude that the district court may review the government's certification that the actions which the Melo plaintiffs allege that West took were within the scope of employment.

The review of the certification as to whether the public employee was acting within the scope of their employ is necessary for the objectives of due process. Without due process, the Petitioner's rights have been violated since the issue of whether the above named defendants were acting within the scope of their employ has been precluded by a failure to provide an evidentiary hearing on the merits.

Moreover, the Respondent's claim to sovereign immunity lacks merit since the allegations of improper conduct by the agents and employees of the United States of America in the complaint are of a nature which goes beyond the scope of their employment. The court in *Lawrence v. United States of America, et al.*, 631 F. Supp. 631 (E.D. Pa. 1982), followed the case of *United States v. Commonwealth of Pennsylvania*, 394 F. Supp. 261 (M.D. Pa. 1975), in which it was determined that:

> [S]overeign immunity plays no role when, as here, federal officials are alleged to have acted outside the scope of their authority.

Lawrence v. United States of America, et al., 631 F. Supp. 631, 638 (E.D. Pa. 1982). It is the same situation as the case at bar. The allegations in the Amended Complaint of the case at bar constitutes a hostile work-environment which resulted in the intentional infliction of emotional distress which the Petitioner has experienced. When the remedy which is sought is other than monetary damages, *i.e.* reinstatement, and the cause of action is based upon the acts and omissions of agents and employees of the United States government, the case should not be dismissed on the basis of sovereign immunity nor on grounds of the applicability of FECA.

The public policy which supports the granting of qualified immuity is attributable to concepts that provide public officials with the latitude to make mistakes without subjection to liability for civil damages. The latitude allows public officials to act in good faith in promoting the goals of their agency. However, qualified immunity is not to be used as a shield whenever public officials "knowingly violate the law," such as the case at bar.

> The qualified immunity standard "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law."

(Citations omitted, *Hunter v. Bryant*, ___ U.S. ___, 112 S. Ct. 534, 537 (1991)). The Petitioner has not alleged that the above named are plainly incompetent. The gravamen of the Petitioner's allegations is that the above named public officials went beyond the scope of their employment to the extent that they were in knowing violation of the common law of Pennsylvania. The comon

law of Pennsylvania proscribes the intentional infliction of emotional distress.

The campaign to oust the Petitioner from her official capacity with the Veterans Administration was characterized by willful and wanton conduct. The malicious motives instigating the actions of the above named defendants were based upon their own negative attitudes towards and/or prejudiced evaluation of the Petitioner.

> While immunity extends to negligent acts, it does not extend to willful and wanton conduct or to acts by public employees based on corrupt or malicious motives . . .

Yonker v. Schoenenberger, 763 F. Supp. 361, 366 (N.D. Ill. 1991). Since the actions of the above named defendants were in the course of their employment but not in the scope of their employment, and instigated by malicious motives, the granting of qualified immunity was improper.

The principles of *respondeat superior* are applicable to determine whether the public employee acted within the scope of his employment. The court must look to the law of the state in which the cause of action arose.

> To determine whether an employee acted within the scope of employment under the Act, a court must look to the principles of respondeat superior of the state in which the tort occurred.

Flynn v. Nesbitt, 771 F. Supp. 766, 769 (E.D.La. 1991). The cause of action arose in the Commonwealth of Pennsylvania; therefore, the court must look to the laws of Pennsylvania which govern the doctrine of *respondeat superior.*

> It is also a matter of the Pennsylvania common law that although willful misconduct of a servant may be within the course of employment, it may not be within its scope thereby subjecting the master of liability.

Maier v. Patterson, 553 F. Supp. 150, 154 (E.D.Pa. 1982). The conduct by the above named defendants alleged by the Petitioner is beyond the scope of employment. The willful misconduct which was designed to oust the Petitioner from her position at the Veterans Administration was albeit in the course of employment not within the scope of that employment.

The Petitioner contends that the conduct alleged in her complaint can in no way be construed to have been performed by the above named defendants acting within the scope of their employment. It is not in the interest of the Veterans Administration to harass their employees. The actions of the above named defendants are detrimental to the agency and are subversive to the maintenance of the morale of the agency as a whole. On the face of the complaint, it is apparent that the above named defendants were not acting in good faith.

> [T]he Browns claim that the certification was false—that their complaint challenges conduct outside the scope of the individual defendants' FMHA employ . . . In any event, argue the Browns, they were improperly deprived of their right to litigate the scope-of-employment issue because the district court treated the U.S. Attorney's certification as conclusive when it substituted the United States as defendant.

Brown v. Armstrong, 949 F.2d 1007, 1010 (8th Cir. 1991). The Petitioner has been deprived of her right to due process by the grant

of the order of substitution based on the present certification. The scope of employment issue has remained untouched, and it is the Petitioner's right to have this issue litigated.

> The court's power to determine whether an employee was acting within the scope of employment is even clearer in § 2679 (d)(3) cases such as this one, the statute specifically provides for the court to determine scope of employment . . .

Snodgrass v. Jones, 957 F.2d 482, 485 (7th Cir. 1992).

When a government employee is acting within the scope of his employ, it is necessary to have him shielded from public liability notwithstanding intentional tortious conduct. The public policy rationale is to provide protection to the public employee when in the conduct of his office he makes good faith mistakes. The public employee, however, should not be shielded when his conduct goes beyond the scope of his employment and when his motives, as in the case at bar, are alleged to be willful and malicious.

The question of whether the Certification of the Attorney General is subject to review has been decided by the United States Court of Appeals for the Third Circuit in the case of *Melo v. Hafer*, 912 F.2d 628 (3rd Cir. 1990). The court determined that, according to the legislative history and a House Report, the Certification of the Attorney General was subject to the district court's review. There is no language in FELRTCA that proscribes court review of certifications. The court reasoned that since an employee could petition the court to seek certification which was denied by the Attorney General, by the same reasoning a dissatisfied Petitioner should be afforded the same opportunity of review.

> There is no suggestion in FELRTCA that once the federal forum has been secured

> Congress was inclined to make the Attorney General's right to substitute the government for the employee unreviewable. In fact, Congress acknowledged the propriety of having a federal court review the scope of employment issue when the positions of the federal employee and the government conflict. Under 28 U.S.C. § 2679 (d)(3) (1988), "[i]n the event that the Attorney General has refused to certify scope of his office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment." The same provision insures a federal forum for such a judicial determination. There is no reason why Congress would have provided employees with judicial review of the scope of employment certification decisions while denying a similar review of certification decisions to dissatisfied plaintiffs . . . . Congress intended that the practice of court determination of the issue should be continued . . . . he stated at a legislative hearing that "the plaintiff would still have the right to contest the certification if they [sic] thought the Attorney General were certifying without justification." . . . we thus independently conclude that the district court may review the government's certification that the actions which Melo plaintiffs allege that West took were within the scope of employment.

Melo v. Hafer, 912 F.2d 628, 641-642 (3rd Cir. 1990). It is the

Petitioner's contention that the allegations in the complaint constitute acts which are clearly outside the scope of the individual defendants' employment and that the Attorney General granted certification without justification.

CONCLUSION

The present case offers an opportunity for this Court to consider and expound upon the purpose and intent of the powers granted by FECA unto the Secretary of Labor by the Congress a matter which has thus far not been subjected to adjudication by this Court, and to correct the lower court's interpretation which undermines and eviscerates the purpose of the FTCA statute which is to provide a remedy for tortious conduct.

Respectfully submitted,

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APPENDIX A — ORDER DENYING PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED SEPTEMBER 24, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 93-1106

DONNA F. CARDWELL,

Appellant

v.

UNITED STATES OF AMERICA

D.C. Civil Action No. 92-00107

Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH and LEWIS, *Circuit Judges.*

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by Appellant, having been submited to the judges who participated in the decision of this Court and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

Appendix A

BY THE COURT:

s/ Becker, J.
Circuit Judge

DATED: September 24, 1993

APPENDIX B — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AUGUST 26, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 93-1106

DONNA F. CARDWELL,

Appellant

v.

UNITED STATES OF AMERICA

Appeal from the United States District Court for the Eastern District of Pennsylvania
D.C. Civil Action No. 92-00107
(District Judge: Honorable Thomas N. O'Neill, Jr.)

Submitted Under 3rd Circuit LAR 34.1(a)
August 26, 1993

Before: BECKER, NYGAARD, and ALITO, *Circuit Judges.*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, and essentially for the reasons set forth in the opinion of Judge O'Neill, it is

ADJUDGED AND ORDERED that the of orders the district

Appendix B

court dated June 10, 1992 and December 3, 1992 be and are hereby AFFIRMED.

BY THE COURT:

s/ Becker, J.
Circuit Judge

APPENDIX C — MEMORANDUM AND ORDER OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED DECEMBER 3, 1992

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 92-0107

DONNA F. CARDWELL

v.

UNITED STATES OF AMERICA, et al.

MEMORANDUM

O'NEILL, J. NOVEMBER, 1992

I. *Introduction*

Plaintiff brought this action pursuant to the Federal Torts Claim Act ("FTCA"), 28 U.S.C. §§ 1346 *et seq.*, alleging that defendants intentionally inflicted emotional distress upon her through a series of job-related incidents during her employment at the Veterans Administration. Currently before the Court is the government's renewed motion to dismiss the amended complaint and plaintiff's petition to amend the amended complaint. For the reasons that follow, I will grant the government's motion and deny plaintiff's petition.

Appendix C

II. *Background*

Plaintiff was employed as a psychologist by the Veteran's Administration. In her amended complaint, she alleges that during the period from May, 1982 through May, 1988 the Veteran's Administration by its agents and employees created a hostile work environment. Among other things, the amended complaint alleges that W.F. Adams, Chief of the Vocational Rehabilitation & Counseling Division at the Veteran's Affairs Regional Office and Insurance Center, made "an unjustified error call," threatened to fire plaintiff on May 12, 1982, gave plaintiff an unjustified sick leave restriction, issued an admonishment letter, threatened plaintiff not to pursue her complaints because " 'management had ways of getting rid of you,' " suspended plaintiff for two days because she had used two franked envelopes, reduced her performance ratings, gave plaintiff an undeserved insubordination call and filed charges of insubordination.

The amended complaint further alleges that Gerald Schweiger, personnel officer at the Veteran's Affairs Regional Office and Insurance Center, refused to counsel plaintiff as to grievance rights, spied on plaintiff's office and "set in motion a series of events (secret memos) that led to Cardwell's wrongful termination."

As a result of these alleged actions and threats, plaintiff claims that she lived in constant fear that she would lose her job and that as a result she suffered severe mental pain, distress, anxiety and anguish.

Before filing her complaint in this Court, plaintiff applied for benefits under the FECA. The Employees Compensation Appeals Board (ECAB) denied plaintiff's request for relief, holding that the

question of whether the alleged employment incidents caused or contributed to plaintiff's depression and caused her disability for work is a medical issue and plaintiff failed to submit any medical evidence to support her claim.

Plaintiff commenced the action in this Court on January 7, 1992. The United States was the only defendant named in the complaint. On February 14, 1992, plaintiff amended her complaint, naming several federal employees as co-defendants. On April 13, 1992, the United States moved to substitute the United States as the sole defendant in place of the federal employees and moved to dismiss the entire action. On June 11, 1992, I granted the government's motion to substitute. In addition, I granted plaintiff leave to amend her amended complaint. At that time, the proposed amendment sought to include additional jurisdictional grounds. Plaintiff did not file the proposed amended complaint, however, and on August 17, 1992 the government filed a renewed motion to dismiss. Subsequently, plaintiff again has petitioned the Court for leave to amend the amended complaint, this time to add claims that defendants violated plaintiff's constitutional rights.[1]

III. *Discussion*

A. *Government's Motion to Dismiss*

The government arges that plaintiff is barred from pursuing this action under the FTCA because her exclusive remedies, if any, are provided by the FECA and the CSRA. Second, the government

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1. I also note that on August 10, 1992, plaintiff filed an interlocutory appeal with the Court of Appeals for the Third Circuit, wherein she appealed the Order substituting the United States for the individual defendants. On September 22, 1992, the Court of Appeals dismissed plaintiff's appeal for lack of jurisdiction.

contends that even if plaintiff is entitled to pursue this action under the FTCA, the amended complaint should be dismissed for failure to state a claim upon which relief may be granted. Third, the government asserts that insofar as plaintiff's claims are based on events which allegedly took place over two years prior to the time plaintiff filed her administrative claim, the claims are barred by the FTCA's statute of limitations. Finally, the goverment argues that to the extent that plaintiff's claims challenge conduct involving Department of Labor employees, the complaint must be dismissed for lack of subject matter jurisdiction because plaintiff did not file an administrative claim concerning the Department of Labor's conduct.

In response, plaintiff asserts that the FECA exclusivity provision does not bar her suit because mental suffering, humiliation and loss of employment are injuries that do not fall within the scope of coverage under the FECA. Additionally, plaintiff argues that she has stated a claim for which relief may be granted.[2]

1. *FECA*

The government argues that this Court lacks subject matter jurisdiction over this matter because the Federal Employees Compensation Act ("FECA") provides plaintiff with her exclusive remedies for her claim of intentional infliction of emotional distress. When the government challenges a court's subject matter

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2. I note that plaintiff also argues that the complaint alleges that the individual defendants acted beyond the scope of their employment and as a result absolute immunity and/or qualified immunity are not applicable to this case. Because the government does not contend in its motion that defendants have absolute or qualified immunity from suit, I need not consider plaintiff's contention.

jurisdiction in a case brought under the FTCA, plaintiff has the burden of establishing that the court has subject matter jurisdiction by "demonstrating an unequivocal waiver of immunity." *Cunningham v. United States*, 786 F.2d 1445, 1446 (9th Cir. 1986).

The FECA establishes a program of workers' compensation for federal employees who are injured in the performance of their duties. 5 U.S.C. § 8102(a). Once it is determined that an injury is within the scope of coverage of FECA, its remedy is exclusive and the employee may not bring any other claims for compensation against the government. *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 194 (1983); *Lucente v. Bolger*, No. 84-4176, slip op. at 1 (E.D.Pa. June 4, 1985).

To ensure uniformity of administration of FECA, the Secretary of Labor is to administer and decide all questions arising under FECA, including those concerning the scope of coverage of FECA. *Dunn v. United States*, 516 F.Supp. 1373, 1374 (E.D.Pa. 1981). The Secretary's decision on whether FECA covers the alleged injury is final and not reviewable by the courts. *Heilman v. United States*, 731 F.2d 1104, 1109 (3d Cir. 1984).[3]

In deference to this authority, the Court of Appeals for the Third Circuit has held that where there is a "substantial question" with respect to FECA coverage, courts must stay further judicial action until the Secretary has made a determination regarding FECA coverage. *Id.* at 1110, citing *Di Pippa v. United States*, 687

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3. In addition, the possibility that an injured employee might recover greater damages under the FTCA than under the FECA does not allow a suit to be brought under the FTCA. *See Dunn*, 516 F.Supp. at 1374. FECA is a substitute for and not a supplement to tort actions. *See United States v. Demko*, 385 U.S. 149, 151 (1966) (workers' compensation laws are "practically always thought of as substitutes for, not supplements to, common-law tort actions").

F.2d 14, 16 (3d Cir. 1982). A "substantial question" exists unless it is certain that the Secretary would find no coverage. *Id.*

The parties dispute whether the emotional harms allegedly suffered by plaintiff are within the coverage of the FECA. A number of courts, including this one, have held that emotional distress damages are recoverable under the FECA. *See Lucente*, No. 84-4176, slip op. at 1 (E.D.Pa. June 4, 1985) ("incidents involving federal employees that give rise to psychological harm such as mental anguish and humiliation have been found by the Secretary to be covered by FECA"); *McDaniel v. United States*, 970 F.2d 194, 198 (6th Cir. 1992) ("we agree [with the Secretary of Labor] that FECA covers McDaniel's claims" for negligent and intentional infliction of emotional distress); *Jones v. Tennessee Valley Authority*, 948 F.2d 258 (6th Cir. 1991); *Castro v. United States*, 757 F.Supp. 1149, 1151 (W.D.Wash. 1991) (because FECA covers emotional injuries, claim for intentional infliction of emotional distress under FTCA is barred); *Burke v. United States*, 644 F.Supp. 566, 568 (E.D.La. 1986).

At the same time, several courts, including this one, have held that such damages do not fall within the scope of the FECA. *See Lawrence v. United States*, 631 F.Supp. 631 (E.D.Pa. 1982) ("FECA does not provide coverage for mental suffering, humiliation, embarrassment or loss of employment . . . .");[4] *Sheehan v. United States*, 896 F.2d 1168, 1169 (9th Cir. 1990), *amended, reh'g denied, en banc*, 917 F.2d 424 (9th Cir. 1990); *Underwood v. United States Postal Service*, 742 F.Supp. 968, 970

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4. In *Lawrence*, the Court also held that the policy underlying the FECA exclusivity provision is inapplicable to cases where *only* equitable relief is sought against the government defendants. *Lawrence*, 631 F.Supp. at 637. In that case, as opposed to the instant case, plaintiff was not seeking compensatory damages from the United States; plaintiff sought reinstatement, transfer and back pay.

(M.D.Tenn. 1990); *Sullivan v. United States,* 428 F.Supp. 79, 81 (E.D.Wis. 1977).

I need not decide whether this issue raises a "substantial question" because the Secretary of Labor has the final say as to the scope of FECA and in this case, the Secretary has taken the view that plaintiff's claim is cognizable under the FECA. *See In the Matter of Donna F. Cardwell and the Veterans Administration,* Docket No. 90-325 (May 11, 1990). Before she instituted this action, plaintiff applied for benefits under the FECA. The Employees Compensation Appeals Board, a division within the Department of Labor, determined that plaintiff had not presented any medical evidence to show that the alleged employment incidents caused or contributed to her depression and anxiety and denied her request for relief. Although it did not explicitly state that emotional harms are recoverable under the FECA, the Board did not state that they are not recoverable under the FECA and ruled on the merits on plaintiff's FECA claim. Accordingly, it can be inferred that the Board believes that scope of FECA coverage extends to claims for psychological damages.[5]

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5. Other decisions of the ECAB hold explicitly that the FECA covers emotional injuries under certain circumstances. In *In the Matter of Lillian Cutler and Department of Labor,* 28 ECAB 125 (1976), the Board held:

> Where an employee experiences emotional stress in carrying out his employment duties, or has fear and anxiety regarding his ability to carry out his duties, and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of the employment. This is true where the employee's disability resulted from his emotional reaction to his day-to-day duties.

(cont'd)

Appendix C

The Secretary's determination of the scope is binding upon this Court. Because the Secretary has decided that the FECA applies to plaintiff's claims, this Court does not have jurisdiction over the matter. Plaintiff's complaint will be dismissed.

2. *Government's alternative arguments*

The government also argues that the CSRA bars plaintiff's claims under the FTCA because the CSRA provides the exclusive remedy for plaintiff's employment-related grievances. In addition, the government contends that this Court does not have jurisdiction over this matter to the extent that plaintiff's claims challenge conduct involving Department of Labor employees, because plaintiff did not file an administrative claim concerning the Department of Labor's conduct. Moreover, the government asserts that even if I were to find that this Court has jurisdiction over this matter, the amended complaint should be dismissed for failure to state a claim upon which relief may be granted and because the claims are barred by the FTCA's statute of limitations.

Because I have concluded that the FECA bars plaintiff's claim, however, I do not have to reach the alternative arguments raised by the government in its motion to dismiss. *See, e.g., McDaniel*, 970 F.2d at 198 (Although Court acknowledged that CSRA applies to adverse personnel actions, it did not decide whether CSRA bars plaintiff's claims under FTCA because it had already found that FECA bars plaintiff's claims).

(cont'd)

Id. at 129-130. *See also In the Matter of Thomas McEuen and the Veterans Administration*, Docket No. 89-1074 (Jan. 10, 1990) ("appellant's emotional reaction bears a direct relationship to his regular or specially assigned duties and constitutes an injury in the performance of duty within the meaning of the Act").

Appendix C

B. *Plaintiff's Petition to Amend Amended Complaint*

On October 30, 1992, plaintiff filed a petition to amend the amended complaint. Under Fed.R.Civ.P. Rule 15, leave to amend should be given freely in the absence of circumstances showing bad faith or dilatory motive, prejudice to the opposing party, or futility of the amendment. *Foman v. Davis*, 371 U.S. 178 (1962); *Teti v. U.S. Healthcare, Inc.*, 1989 WL 143274 (E.D.Pa. 1989). An amendment of the complaint is futile if an amendment will not cure the defect or if the amended complaint would not survive a motion to dismiss. *Jablonski v. Pan American World Airways, Inc.*, 863 F.2d 289, 292 (3d Cir. 1988).

Plaintiff seeks to amend her amended complaint to include allegations that defendants violated plaintiff's rights guaranteed by the First, Fifth and Fourteenth Amendments to the United States Constitution. Plaintiff's proposed amendments do not add additional jurisdictional grounds; therefore, I infer that she intends to bring her proposed constitutional claims pursuant to the FTCA.

Under the FTCA, the United States has consented to a limited waiver of its sovereign immunity, *United States v. Orleans*, 425 U.S. 807, 813 (1976), but it did not waive sovereign immunity from claims that the United States violated a person's constitutional rights. *McCollum v. Bolger*, 794 F.2d 602, 608 (11th Cir. 1986). In *McCollum*, the Court of Appeals for the Eleventh Circuit affirmed the dismissal of plaintiff's claim that the United States Postal Service had committed constitutional torts. The Court held that the federal courts have no subject matter jurisdiction over claims alleging constitutional torts because

> federal constitutional torts . . . are not within the scope of the FTCA. That statute waives the

> sovereign immunity of the United States for the tortious acts of its employees only "if such torts committed in the employ of a private person would have given rise to liability under state law . . . ." By definition, constitutional torts are not based on state law.

Id., quoting *Birnbaum v. United States*, 588 F.2d 319, 322 (2d Cir. 1978).

I conclude that plaintiff would not be able to bring her proposed constitutional claims under the FTCA and the proposed amendment would not survive a motion to dismiss. Accordingly, as an amendment is futile, I will not grant plaintiff leave to amend her amended complaint.

IV. *Conclusion*

For the foregoing reasons, I will dismiss plaintiff's amended complaint and deny plaintiff's petition to amend the amended complaint.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 92-0107

DONNA F. CARDWELL

v.

UNITED STATES OF AMERICA, et al.

ORDER

AND NOW, this *1st* day of December, 1992, for the reasons stated in the accompanying memorandum, it is hereby ORDERED that:

1. The renewed motion of the United States to dismiss the complaint is GRANTED. Plaintiff's complaint is DISMISSED.

2. Plaintiff's petition to amend the amended complaint is DENIED.

s/ Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR., J.

Supreme Court, U.S.
FILED
APR 4 1994
OFFICE OF THE CLERK

No. 93-1015

In the Supreme Court of the United States

OCTOBER TERM, 1993

DONNA F. CARDWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's claims under the Federal Tort Claims Act (FTCA) were barred by the Secretary of Labor's determination that the claims are covered by the exclusive remedies prescribed in the Federal Employees' Compensation Act.

2. Whether, in this FTCA action, the United States was properly substituted for the individual federal defendants pursuant to 28 U.S.C. 2679(d)(1).

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1015

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 3a-4a) is unreported, but the judgment is noted at 6 F.3d 778 (Table). The opinion of the district court (Pet. App. 5a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1993. A petition for rehearing was denied on September 24, 1993. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on December 23, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was employed as a psychologist by the Veterans Administration (VA). In this action and several other proceedings she has alleged that from May, 1982, through May, 1988, the VA created a hostile work environment for her. Specifically, she alleges that she was improperly disciplined, threatened with dismissal, and inadequately assisted in her attempts to get training and administrative relief from the alleged harassment. She further alleges that as a result of these incidents she has suffered emotional distress. Pet. App. 6a.

1. a. Before filing this action, petitioner presented her claim of job-related emotional injury in an application for benefits under the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.* On May 11, 1990, the Employees Compensation Appeals Board within the Department of Labor affirmed the decision of the Office of Workers' Compensation Programs denying her claim. 93-1106, Supp. C.A. App. 19-27. The Board stated that emotionally disabling conditions may be covered by FECA (*id.* at 25):

> When an employee experiences an emotional reaction to his or her regular or special assigned employment duties or to a requirement imposed by the employment or has fear and anxiety regarding his or her ability to carry out his or her duties and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment and comes within coverage of the Act.

The Board also determined that petitioner identified several employment incidents that could cause a

"compensable emotional disabling condition." *Ibid.* The Board concluded, however, that petitioner had failed to submit medical evidence to show that her alleged emotional distress was caused by those incidents, even after she had been advised that medical evidence was necessary to support her claim. *Id.* at 27; see Pet. App. 6a-7a.

b. Prior to filing this action, petitioner also sought relief under the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111. Pursuant to the CSRA, after petitioner was dismissed from her job at the VA on April 8, 1988, she appealed her dismissal to the Merit Systems Protection Board (M.S.P.B.). The M.S.P.B. affirmed the agency's dismissal action, finding no grounds for petitioner's claim of harassment. *Donna F. Cardwell* v. *Veterans Administration*, No. PH07528810311 (Phila. Regional Office, M.S.P.B., Aug. 24, 1988). Petitioner sought a second review of her case, and the M.S.P.B. again affirmed the agency's dismissal action. *Donna F. Cardwell* v. *Veterans Administration*, No. PH7528810311 (M.S.P.B. Jan. 6, 1989).

2. Petitioner filed this action in the United States District Court for the Eastern District of Pennsylvania on January 7, 1992, seeking damages pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.* Her initial complaint named only the United States as a defendant. On February 14, 1992, however, petitioner filed an amended complaint naming several federal employees as additional defendants. The district court granted the government's motion to substitute the United States for the individual defendants pursuant to 28 U.S.C. 2679(d)(1).[1] The district court also granted

[1] Petitioner filed an interlocutory appeal from the order substituting the United States for the individual defendants, and the

petitioner's motion for leave to file a proposed amended complaint alleging jurisdiction on grounds additional to the jurisdictional provision of the FTCA (28 U.S.C. 1346(b)). However, petitioner never filed the proposed amended complaint. Pet. App. 7a.

Thereafter, the district court granted the government's motion to dismiss the action. Pet. App. 5a-15a. The court began by observing that the workers' compensation remedy provided by FECA is "exclusive" and supplants "any other claims for compensation against the government." *Id.* at 9a (citing *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190, 194 (1983)); see 5 U.S.C. 8116(c). The court further observed that under FECA the Secretary of Labor has authority to "decide all questions arising under FECA, including those concerning the scope of coverage of FECA," and that "[t]he Secretary's decision on whether FECA covers the alleged injury is final and not reviewable by the courts." Pet. App. 9a. The district court noted that "in this case, the Secretary has taken the view that [petitioner's] claim is cognizable under the FECA." *Id.* at 11a (citing *In re Donna F. Cardwell and the Veterans Admin.*, No. 90-325 (May 11, 1990)). The court accordingly held that, because "[t]he Secretary's determination of the scope [of FECA] is binding upon this Court," petitioner's action is barred by the exclusivity provisions of FECA. Pet. App. 12a.

In the same order in which it granted the government's motion to dismiss, the district court denied petitioner's motion for leave to amend her complaint to add constitutional claims. Pet. App. 13a-14a. The court inferred from petitioner's failure to plead additional juris-

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court of appeals dismissed that appeal for lack of jurisdiction. Pet. App. 7a n.1.

dictional grounds that her constitutional claims were based solely on the FTCA. *Id.* at 13a. The court held that those claims were not cognizable under the FTCA because the FTCA "d[oes] not waive sovereign immunity from claims that the United States violated a person's constitutional rights." *Ibid.*[2]

3. The court of appeals affirmed in an unpublished judgment order. Pet. App. 3a-4a.

ARGUMENT

1. Petitioner argues (Pet. 6-20) that the courts below erred in holding that this FTCA action is barred because it is based on claims that the Secretary has determined are covered by FECA. That holding, however, is fully consistent with the language and structure of FECA and with decisions of this Court and the courts of appeals. Further review is therefore unwarranted.

a. FECA establishes a workers' compensation scheme under which federal employees and their survivors receive benefits, regardless of fault, for employment-connected injuries or death. FECA "was designed to

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[2] Petitioner filed two other actions in the Eastern District of Pennsylvania based on allegations against the VA substantially similar to those asserted here. In April, 1986, petitioner sued VA officials and the Department of Labor, claiming that her sick leave was restricted, she was admonished, and she was suspended from work because of her sex. *Donna F. Cardwell* v. *General Thomas K. Turnage, et al.*, Civ. No. 86-2226 (order dated June 25, 1987). The district court dismissed that action as "frivolous." *Ibid.* In another action filed on August 15, 1988, petitioner alleged that she was improperly threatened with dismissal, she had her sick leave restricted, she incurred an undeserved "error call," she was suspended, and she endured harassment. *Donna F. Cardwell* v. *United States, et al.*, Civ. No. 87-0962. The district court suspended that action on November 9, 1988, pending petitioner's exhaustion of her administrative remedies.

protect the Government from suits under statutes, such as the Federal Tort Claims Act, that had been enacted to waive the Government's sovereign immunity." *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190, 193-194 (1983). Accordingly, the text of FECA states that the liability of the United States for injuries covered by FECA "is exclusive and instead of all other liability of the United States or the instrumentality to the employee." 5 U.S.C. 8116(c).

The authority to determine whether a federal employee's injury is covered by FECA is vested in the Secretary of Labor. FECA empowers the Secretary "to decide all questions arising under" (5 U.S.C. 8145) the Act and provides that his decisions are "final and conclusive" and "not subject to review" by any court (5 U.S.C. 8128(b)). In *Southwest Marine, Inc.* v. *Gizoni*, 112 S. Ct. 486 (1991), this Court observed that "FECA contains an 'unambiguous and comprehensive' provision barring any judicial review of the Secretary's determination of FECA coverage. Consequently, the courts have no jurisdiction over FTCA claims where the Secretary of Labor determines that FECA applies." *Id.* at 493 (citing 5 U.S.C. 8128(b); quoting *Lindahl* v. *OPM*, 470 U.S. 768, 780 & n.13 (1985)). Consistent with that reading of FECA, every circuit to consider the issue has held that FECA requires federal courts to dismiss or stay an FTCA action brought by an injured federal employee if the action raises a substantial question regarding FECA coverage.[3] A substantial question of coverage exists

[3] See, *e.g.*, *McDaniel* v. *United States*, 970 F.2d 194, 198 (6th Cir. 1992) (per curiam); *Bruni* v. *United States*, 964 F.2d 76, 78-79 (1st Cir. 1992); *Griffin* v. *United States*, 703 F.2d 321, 322 (8th Cir. 1983); *DiPippa* v. *United States*, 687 F.2d 14, 16 (3d Cir. 1982); *Wallace* v. *United States*, 669 F.2d 947, 951-952 (4th Cir. 1982); *Reep* v. *United States*, 557 F.2d 204, 207 (9th Cir. 1977); *Bailey* v.

"unless it is *certain* that the Secretary would not find coverage." *Bruni* v. *United States*, 964 F.2d 76, 79 (1st Cir. 1992).

This Court's observation in *Southwest Marine, Inc.* and the uniform holdings of the courts of appeals giving effect to the exclusivity provisions of FECA dispose of petitioner's challenge to the dismissal of her claims. As the district court observed, her claims are based exclusively on the FTCA. Pet. App. 13a; see also Pet. 2. The Secretary of Labor has determined, however, that those claims are covered by FECA. Pet. App. 11a. Because the Secretary has determined that FECA applies, "the [district] court[] ha[d] no jurisdiction over [petitioner's] FTCA claims." *Southwest Marine, Inc.*, 112 S. Ct. at 493.

b. There is no merit to petitioner's argument (Pet. 6-13) that the constitutional separation-of-powers doctrine bars Congress from authorizing the Secretary of Labor to decide whether an injury is covered by FECA, while also precluding judicial review of the Secretary's decisions. This Court has never suggested that it would be unconstitutional for Congress to preclude judicial review of nonconstitutional issues raised in administrative determinations. "'[N]either this Court nor Congress has read the Constitution as requiring every federal question arising under the federal law * * * to be tried in an Art. III court' * * *. Instead, the Court has long recognized that Congress is not barred from acting pursuant to its powers under Article I to vest decisionmaking authority in tribunals that lack the attributes of Article III courts." *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568, 583 (1985), quoting

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United States, 451 F.2d 963, 965 (5th Cir. 1971); see also *Daniels-Lumley* v. *United States*, 306 F.2d 769, 770-771 (D.C. Cir. 1962).

Palmore v. *United States*, 411 U.S. 389, 407 (1973); see also, *e.g.*, *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297, 303 (1943) ("Congress has long delegated to executive officers or executive agencies the determination of complicated questions of fact and of law").

This case does not involve the adjudication of "private rights," a matter as to which Congress's power to place adjudicative authority in non-Article III tribunals is limited. See generally *Granfinanciera, S. A.* v. *Nordberg*, 492 U.S. 33, 51-55 (1989). Instead, petitioner is asserting a right to workers' compensation, a remedy wholly of statutory origin. See *id.* at 53-54. With respect to such statutory benefits, "[t]he United States may create rights in individuals against itself and provide only an administrative remedy." *Tutun* v. *United States*, 270 U.S. 568, 576 (1926); accord *United States* v. *Babcock*, 250 U.S. 328, 331 (1919) ("when [the United States] creates rights in individuals against itself, [it] is under no obligation to provide a remedy through the courts").

Contrary to petitioner's contention (Pet. 7-8), the decisions of the courts below do not conflict with *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), *Social Security Board* v. *Nierotko*, 327 U.S. 358 (1946), or *Stark* v. *Wickard*, 321 U.S. 288 (1944). *Marbury* v. *Madison* has not been interpreted to prevent courts from deferring to administrative interpretations of a statute when Congress has authorized the administrative body to decide such questions. See generally Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1, 18 (1983). Petitioner cites (Pet. 7-8) *Nierotko* and *Stark* for the proposition that an agency "may not finally decide the limits of its statutory power." The decisions of the courts below are consistent that principle. Under *Nierotko* and *Stark*, it is for the courts, not the

Secretary, to decide whether Congress authorized the Secretary to determine FECA coverage questions without judicial review.[4] The courts below—in accordance with the text of FECA and with all of the courts of appeals that have addressed the issue, see p. 6 & n.3, *supra*—decided that Congress did confer such authority on the Secretary in FECA. The separation-of-powers doctrine does not prevent courts from deferring to administrative decisions that the courts determine have been made within the scope of statutory authority.

2. In addition to challenging the decision of the courts below to defer to the Secretary's determination that petitioner's claims are covered by FECA, petitioner challenges the Secretary's determination on the merits. That challenge does not warrant further review for two reasons. First, it is foreclosed for the reasons discussed above in point 1: FECA expressly bars direct judicial review of the Secretary's decision on a claim for FECA benefits. 5 U.S.C. 8128(b), 8145. Petitioner cannot circumvent that statutory bar by seeking judicial review of the Secretary's decision in an FTCA action. In any event, petitioner's challenge is without merit.

a. Petitioner's primary argument (Pet. 13-20) is that FECA does not cover emotional injuries. The Secretary of Labor, however, has taken the contrary view,

[4] Both *Nierotko* and *Stark* involved questions of statutory interpretation. In *Nierotko*, the Court held that Congress did not delegate to the Social Security Board the authority to determine what compensation paid by employers to employees should be treated as wages under the Social Security Act. The Court noted, however, that Congress could have done so had it wished. 327 U.S. at 369. In *Stark*, the Court held that Congress did not intend to preclude judicial review of certain actions taken by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.* 321 U.S. at 307-310.

interpreting FECA to cover emotional injuries.[5] Even if that interpretation were subject to judicial review in this action, it would be entitled to substantial deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), and would have to be upheld as representing, at a minimum, a plausible reading of FECA. See 5 U.S.C. 8101(5) (defining "injury" for FECA purposes).

Moreover, the most recent decisions by the courts of appeals acknowledge, in accord with the Secretary's determination, that emotional injuries are covered by FECA. See *Figueroa* v. *United States*, 7 F.3d 1405, 1408 (9th Cir. 1993) ("FECA * * * contemplates coverage for a condition of emotional distress that *results from* the stress of being exposed in a *discrete* event to a toxic substance that could cause future physical harm."), petition for cert. pending (filed Dec. 16, 1993) (No. 93-972); *Swafford* v. *United States*, 998 F.2d 837, 840-841 & n.1 (10th Cir. 1993) (FECA covers emotional injuries arising out of sexual harassment); *McDaniel* v. *United States*, 970 F.2d 194, 197-198 (6th Cir. 1992) (FECA covers injuries caused by workplace harassment).

The only court of appeals decisions cited by petitioner (Pet. 17-20) as holding to the contrary are *DeFord* v. *Secretary of Labor*, 700 F.2d 281 (6th Cir. 1983), *Sheehan*

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[5] See, *e.g.*, *In re Lillian Cutler & Dep't of Labor*, 28 Empl. Comp. App. Bd. 125, 129-130 (1976):

> Where an employee experiences emotional stress in carrying out his employment duties, or has fear and anxiety regarding his ability to carry out his duties, and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of the employment.

v. *United States*, 896 F.2d 1168, modified, 917 F.2d 424 (9th Cir. 1990), and *Heilman* v. *United States*, 731 F.2d 1104 (3d Cir. 1984). The Third Circuit's decision in *Heilman*, however, actually *supports* the decisions below.[6] The Sixth Circuit and the Ninth Circuit have issued decisions subsequent to *DeFord* and *Sheehan* that make it unnecessary for this Court to resolve any arguable conflict between those two decisions and the decisions below.

In *DeFord*, the Sixth Circuit held that the plaintiff was not barred by FECA from recovering compensatory damages authorized under the Energy Reorganization Act of 1974, 42 U.S.C. 5851, for unlawful discrimination. 700 F.2d at 290-291. Although that holding is plainly inapposite here, the court suggested, in dictum that arguably conflicts with the decisions below, that FECA does not cover claims for "discrimination, *mental distress*, or loss of employment." *Id.* at 290 (emphasis added). In two later decisions, however, the Sixth Circuit has viewed as binding the Secretary's determination that emotional injuries may be covered by FECA, whether or not compensation is actually available for the injury claimed. *McDaniel* v. *United States*, 970 F.2d at 197-198; *Jones* v. *TVA*, 948 F.2d 258, 265 (6th Cir. 1991).

In *Sheehan*, the Ninth Circuit held that the plaintiff's FTCA action for emotional distress caused by workplace sexual harassment was not barred by the Secretary's

[6] The plaintiff in *Heilman* alleged that he suffered injuries from exposure to radiation both as a military service member and as a federal civilian employee. The Third Circuit held that the injuries the plaintiff allegedly suffered as a civilian employee plainly were covered by FECA and thus could not provide the basis for an FTCA action. 731 F.2d at 1110-1111.

determination that emotional injuries are covered by FECA. 896 F.2d at 1174. In its later decision in *Figueroa*, 7 F.3d at 1408, however, the Ninth Circuit read *Sheehan* narrowly to "stand[] only for the proposition that when a plaintiff has failed to allege a colorable claim under FECA as a matter of law, the district court should render a judgment." The *Figueroa* court emphasized that it "d[id] not read *Sheehan* as altering the general rule that when a claim arguably falls under FECA, the question of coverage should be resolved by the Secretary." *Ibid.* The court in *Figueroa* held that the plaintiff's FTCA claim for emotional distress was barred by FECA, because "[a]rguably, mental distress is a form of stress" covered by FECA. *Ibid.* In so holding, the court relied in part on the fact that "the Department of Labor has determined that emotional distress may be considered a disability" covered by the Act. *Ibid.*

In light of *Figueroa*, any conflict between *Sheehan* and the decisions below does not warrant further review at this time.[7] *Sheehan* suggested that courts should independently determine whether an injury is covered by FECA and that emotional injuries are not covered under that Act. *Figueroa*, however, creates considerable uncertainty about the Ninth Circuit's position on both scores, since it reaffirms the "general rule" that questions of FECA coverage should be decided by the Secretary, and it gives weight to the Secretary's determination that emotional injuries are covered. It is thus far from clear that the Ninth Circuit would have entertained

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[7] The government has taken the position that *Sheehan* was wrongly decided, but for reasons discussed in the text, further review is unwarranted in this case without regard to the merits of *Sheehan*.

petitioner's FTCA claims, given the Secretary's determination that her claims are covered by FECA.[8]

b. Petitioner also argues (Pet. 8) that FECA does not cover her alleged injuries because, she claims, they stem from intentional, as distinguished from negligent, conduct. FECA, however, is an employee's exclusive remedy for "injury or death," 5 U.S.C. 8116(c); it makes no exception for injuries that are intentionally inflicted.[9] Consistent with FECA's plain language, courts have uniformly held that "FECA covers liability created both by negligent *and intentional* acts on the part of the Government." *Green* v. *Hill*, 954 F.2d 694, 697 (11th Cir. 1992) (emphasis added). Accord *Heilman* v. *United States*, 731 F.2d 1104, 1111 n.6 (3d Cir. 1984); *Metz* v. *United States*, 723 F. Supp. 1133, 1135-1137 (D. Md. 1989);

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[8] Further review is unwarranted for the additional reason that, even if petitioner's claims were not barred by FECA, they would be barred on other grounds. Substantially all of petitioner's claims are based on personnel actions (*e.g.*, reduction in performance ratings) for which the CSRA provides the exclusive remedies. See, *e.g.*, *Gergick* v. *Johnson*, 997 F.2d 1237 (8th Cir. 1993) (CSRA barred FTCA claim for intentional infliction of emotional distress caused by workplace harassment), petition for cert. pending, No. 93-959; *Morales* v. *Department of the Army*, 947 F.2d 766, 768-769 (5th Cir. 1991); *Rollins* v. *Marsh*, 937 F.2d 134, 139-140 (5th Cir. 1991); *Saul* v. *United States*, 928 F.2d 829, 840-841 (9th Cir. 1991); cf. *United States* v. *Fausto*, 484 U.S. 439 (1988) (CSRA precludes suit under Tucker Act, 28 U.S.C. 1491, to obtain judicial review of an adverse personnel action); *Bush* v. *Lucas*, 462 U.S. 367 (1983) (CSRA preempts *Bivens* action for matters arising out of the employment relationship).

[9] FECA does exempt from compensation those injuries caused by (1) the injured employee's own willful misconduct, (2) his intent to injure himself, or (3) his intoxication. See 5 U.S.C. 8102(a)(1)-(3). Section 8102(a) establishes no similar exception for injuries intentionally inflicted upon a worker by a government agent.

Burke v. *United States*, 644 F. Supp. 566, 569 (E.D. La. 1986). Petitioner cites no authority to the contrary.

3. Petitioner contends (Pet. 21-30) that the district court erred in granting the government's motion to substitute the United States for the individual federal defendants under 28 U.S.C. 2679(d)(1). That contention is incorrect.

Section 2679(d)(1) of Title 28 provides, in pertinent part:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the [FTCA] * * *, and the United States shall be substituted as the party defendant.

Section 2679(d)(1) thus makes it clear that the district court is required to substitute the United States for individual defendant employees if the Attorney General has certified that the employees were acting within the scope of their office or employment when they engaged in the conduct upon which petitioner's claims are based.

Section 2679(d)(1) fully applies here. The Attorney General certified that the individual defendants named in petitioner's amended complaint were acting within the scope of their employment in this case. The determination underlying the Attorney General's certification is not open to serious challenge. Petitioner alleged that the individual defendants improperly disciplined her, threatened her with dismissal, and inadequately assisted her in her attempts to get training and administrative relief from harassment. Those allegations relate to

supervisory and management actions that the defendants took in furtherance of their employment duties.

Petitioner errs in contending (Pet. 21) that the individual defendants could not have acted within the scope of their employment because they committed intentional torts. The question whether the defendants were acting within the scope of their employment for purposes of Section 2679(b)(1) is governed by the law of Pennsylvania, where the alleged conduct occurred. *Aliota* v. *Graham*, 984 F.2d 1350, 1358 (3d Cir. 1993). Pennsylvania has rejected the notion that an employee's intentionally wrongful acts cannot be within the scope of his or her employment. See, *e.g.*, *Butler* v. *Flo-Ron Vending Co.*, 557 A.2d 730, 736 (Pa. Super. Ct. 1989); see also *Johnson* v. *Carter*, 983 F.2d 1316, 1322-1324 (4th Cir. 1993) (FTCA claims of slander and libel were within scope of employment under Virginia law).[10]

[10] Similarly, prior to enactment of the Federal Employees Liability Reform Tort and Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, this Court rejected the notion that a wrongful purpose underlying the federal employee's action would defeat the absolute immunity accorded to federal employees under certain circumstances. *Barr* v. *Matteo*, 360 U.S. 564, 575 (1959) (plurality opinion); see also *Arajuo* v. *Welsh*, 742 F.2d 802, 804 (3d Cir. 1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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